A. In *Houston v. Hill*, This Court Recognized that the Government Could Not Criminalize Speech Which Interfered with Police Actions.

In *Houston v. Hill, supra,* the Court addressed a Houston ordinance which made it unlawful "for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty. . . ." 482 U.S. at 455, *quoting* Ordinances, City of Houston, Texas § 34-11(a) (1984). Mr. Hill had been charged under this ordinance after he shouted at police officers who had stopped his friend. Hill attempted to "divert" the officers' attention from his friend and yelled "Why don't you pick on somebody your own size?" One of the officers responded, "Are you interrupting me in my official capacity as a Houston police officer?" Hill then shouted, "Yes, why don't you pick on somebody my size?" 482 U.S. at 453-54.[2] Hill was arrested, but was ultimately acquitted by a jury. He then filed a civil lawsuit on the issue of the constitutionality of the Houston ordinance.

This Court held that the ordinance was unconstitutionally overbroad in that it prohibited verbal challenges to the police, which were entitled to protection:

> [T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. "Speech is often provocative

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[2] As in Ms. Dempére's case, the testimony between the officer and Mr. Hill "substantially diverge[d]," leading this Court to "note the applicability of JUSTICE POWELL's observation that there is a 'possibility of abuse' where convictions under an ordinance frequently turn on the resolution of a 'direct conflict of testimony as to 'who said what.'" *Houston v. Hill*, 482 U.S. at 454 n.2, *quoting Lewis v. City of New Orleans*, 415 U.S. 130, 135, n.* (1974) (POWELL, J., concurring in result).

> and challenging. . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

Houston v. Hill, 482 U.S. at 461, *quoting Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

The Court noted that verbally challenging police officers was a hallmark of a free society:

> The Constitution does not allow such speech to be made a crime. [Footnote omitted] The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.

482 U.S. at 462-63.

Because the Houston ordinance criminalized verbal challenges to police actions, and was not limited to fighting words, "nor even to obscene or opprobrious language," 482 U.S. at 462, the ordinance was unconstitutionally overbroad and facially invalid.

In his concurring opinion, Justice Powell also concluded the Houston ordinance was unconstitutional, but questioned:

> the implication of the Court's opinion that the First Amendment generally protects verbal "challenge[s] directed at police officers," *ante*, at 461. A "challenge" often takes the form of opposition or interruption of performance of duty. [Footnote omitted] In many situations, speech of this type directed at police officers will be functionally

> indistinguishable from conduct that the First Amendment clearly does not protect. For example, I have no doubt that a municipality constitutionally may punish an individual who chooses to stand near a police officer and persistently attempt to engage the officer in conversation while the officer is directing traffic at a busy intersection. Similarly, an individual, by contentious and abusive speech, could interrupt an officer's investigation of possible criminal conduct. A person observing an officer pursuing a person suspected of a felony could run beside him in a public street shouting at the officer.

482 U.S. at 479 (Powell, J., concurring).

In a footnote, the majority recognized Justice Powell's concerns and agreed that "such conduct might constitutionally be punished under a properly tailored statute" that "prohibited individuals from physically obstructing an officer's investigation." 482 U.S. at 462 n.11. The Court cited as an example *Colten v. Kentucky*, 407 U.S. 104 (1972), a case which rejected as "near frivolous" the contention that the First Amendment protected the right of bystanders to observe the police issue a traffic citation. 407 U.S. at 109. *See also City of Chicago v. Morales*, 527 U.S. 41, 69 (1999) (Kennedy, J., concurring) (assuming that some police commands need to be followed, at risk of criminal prosecution – "Illustrative examples include when the police tell a pedestrian not to enter a building and the reason is to avoid impeding a rescue team, or to protect a crime scene, or to secure an area for the protection of a public official.").

B. Justice Powell's Concurring Opinion Assumed that the Police Act Lawfully, But What if the Police Act Unlawfully?

The majority's footnote in *Hill*, Justice Powell's concurring opinion, and the decision in *Colten* all assume the good faith of police behaviors, and the consequent duty of bystanders not to interfere. Yet, should bystanders stand mute in the face of blatantly illegal police misconduct? If the police are acting illegally, should not a bystander have a right, protected by the First Amendment, verbally to challenge police behavior, even if such challenges actually interfere with the police misconduct? Would Rodney King's injuries have been less severe if the person videotaping had shouted at the officers to stop beating him, thereby distracting the officers?

In Ms. Dempére's case, the police had no authority, under the Fourth Amendment, to act in the way that they did. From the moment of their arrival at the scene, they acted illegally – they handcuffed the victim, and then forcefully detained Mr. Garza, who was suspected of committing no crime. Indeed, Mr. Garza was merely in the vicinity of some, as of yet, undefined incident and had a Fourth Amendment right to walk away, unmolested by the police. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."); *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (person who is not seized should feel free to disregard the police and go about his business). Under this Court's Fourth Amendment jurisprudence, the Tukwila police acted with alarming illegality when they grabbed Mr. Garza, threw him to the ground, handcuffed him and pepper sprayed him for no reason

other than his mere presence near some disturbance, the nature of which had not even been determined.

Thus, the police were not discharging their "official powers or duties" as that term used in RCW § 9A.76.020. *See In re Manuel G.*, 941 P.2d 880, 885 (Cal. 1997) ("The long-standing rule in California and other jurisdictions is that a defendant cannot be convicted of an offense against a peace officer '*engaged in . . . the performance of . . .* [his or her] *duties*' unless the officer was acting lawfully at the time the offense against the officer was committed.") (original italics, internal quotes and citation omitted).

Prior Washington State cases recognized that police officers act within their "official powers or duties" only if they are acting in good faith, and are not on a "frolic of their own." *State v. Hudson*, 784 P.2d 533, 536 (Wash. App. 1990); *Spokane v. Hays*, 995 P.2d 88, 92 (Wash. App. 2000). However, an officer does not act in "good faith," if a reasonable officer should know that his or her actions violate clearly established law. *Groh v. Ramirez*, 540 U.S. 551, 563-65 (2004).

Here, any reasonable officer should know that the Fourth Amendment prohibits what the officers did in this case – the use of physical force to restrain a bystander who was merely walking in the area of some undefined crime. Because the police were acting illegally, in violation of the Fourth Amendment, Ms. Dempére had the right, under the First Amendment, to approach the officers and shout at them to stop hurting Mr. Garza. Even if she said "this is America" and that she "can do what she wants to do" (comments that Ms. Dempére denied making), she was not far from the mark:

> He was, however, speaking to a representative of government, the police. And it is to government that one goes "for a redress of grievances," to use an almost forgotten phrase of the First Amendment. But it is said that the purpose was "to cause inconvenience and annoyance." Since when have we Americans been expected to bow submissively to authority and speak with awe and reverence to those who represent us? The constitutional theory is that we the people are the sovereigns, the state and federal officials only our agents. We who have the final word can speak softly or angrily. We can seek to challenge and annoy, as we need not stay docile and quiet.

Colten v. Kentucky, 407 U.S. at 121-22 (Douglas, J., dissenting).

Indeed, without even having to analyze the legality of police behavior, Ms. Dempére had the right to shout at the police not to hurt Mr. Garza. *See Wilson v. Kittoe*, 337 F.3d 392 (4th Cir. 2003) (not obstruction under Virginia law for lawyer to offer assistance to arrestee); *Gulliford v. Pierce County*, *supra* (individual had right to tell officers dealing with disturbance "why don't you hop on the ferry, hop on the ferry and go back"); *Brooks v. North Carolina Department of Corrections*, 984 F.Supp. 940 (E.D.N.C. 1997) (vacating conviction of a minister who complained about police racial epithets and who failed to leave the scene); *L.A.T. v. State*, 650 So.2d 214 (Fla. App. 1995) (defendant had First Amendment right to yell to gathering crowd "police brutality, Rodney King style," as well as a series of swear words, regarding officers who were arresting his friend); *City of Milwaukee v. Wroten*, 466 N.W.2d 861 (Wis. 1991) (affirming, on First Amendment grounds, dismissal of

charges against defendant who refused to leave the scene of juvenile disturbance); *State v. Janisczak*, 579 A.2d 736 (Me. 1990) (defendant had right to yell abusive names and to yell "you don't have the right to do that" at officers making an arrest).

The Fourth Amendment violation and excessive force that was being applied to Mr. Garza gave Ms. Dempére even more of a right to interfere with the police by shouting at them. This is not to say that Ms. Dempére could have or should have incited the crowd to harm the officers. However, there is no suggestion even that Ms. Dempére used rude language or obscenities toward the officers, let alone fighting words. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Even looking at the evidence in the light most favorable to the government, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), Ms. Dempére did no more than complain loudly about illegal police behavior, while coming within a few feet of the officers. Under *Houston v. Hill*, *supra*, the First Amendment and the Due Process Clause of the Fourteenth Amendment, she should not have been convicted for verbally challenging the officers who were illegally arresting Mr. Garza, even if her shouting actually interfered with their efforts.

C. Because the Instructions Violated Ms. Dempére's First Amendment Rights, Washington's Obstruction Statute is Either Facially Unconstitutional or Unconstitutional as Applied to Ms. Dempére.

Apart from the sufficiency issue, the Washington courts have upheld, in Ms. Dempére's case, the use of a jury instruction in obstruction cases which directly conflicts with the protections of the First Amendment. Here,

Instruction No. 5 states: "Absent a threat of serious bodily injury to the arrestee, a person is prohibited from interfering with an arrest made by a uniformed police officer." App. 33a. As pointed out by Ms. Dempére's lawyer at trial, this instruction "eliminate[d] simply the exercise of first amendment rights." App. 35a.

In *Houston v. Hill*, *supra*, Mr. Hill essentially challenged one of the police officers to fight him in an effort to prevent the officers from hitting his friend. 482 U.S. at 453-54 & n.1. Yet, at worst, the officer had only grabbed his friend, "placed him up against a wall, and threatened to hit him with a large flashlight," a version disputed by the officer. *Id.* In neither version was there a "threat of serious bodily injury." The lack of such a threat did not play a factor in the Court's holding that a person has the First Amendment right to challenge verbally police behaviors even if an officer is in fact interrupted in the execution of his or her duty. The right to shout at an officer to follow the Constitution cannot depend on whether the victim of police illegality is going to be *seriously* hurt as opposed to being *moderately* hurt. Thus, Instruction No. 5 violated the First Amendment and the holding of *Houston v. Hill*, *supra*. *See also Gulliford v. Pierce County*, 136 F.3d at 1348-50 (noting as accurate a proposed instruction stating that the First Amendment protects right to challenge or verbally oppose police activity so long as challenge does not involve threat or fighting words).

In Washington courts, Ms. Dempére did not mount a facial challenge to the Washington obstruction statute on vagueness or overbreadth grounds. Rather, she challenged Instruction No. 5, in addition to making the sufficiency argument based on the First and Fourth Amendments. However, the failure of the Washington courts to hold that

Instruction No. 5 was improper makes Washington's obstruction statute, RCW § 9A.76.020, unconstitutionally vague and overbroad as it has been applied to Ms. Dempére. *See generally City of Chicago v. Morales*, 527 U.S. at 74-83 (Scalia, J., dissenting) (discussing "as applied" challenges).

Alternatively, if Washington Courts have construed the statute to require that the victim of a police assault actually face the threat of serious bodily injury before a bystander can verbally intervene, *see City of Chicago v. Morales*, 527 U.S. at 61, the statute is unconstitutional on its face under *Houston v. Hill*, *supra*.

D. The Washington Courts Failed to Appreciate the First Amendment Issues Involved.

In Ms. Dempére's case, the Washington courts utterly failed to analyze the First Amendment issues at stake. The Washington Court of Appeals' unpublished decision does not cite or discuss *Houston v. Hill*, *supra*. App. 11a-13a, 15a-17a. On direct appeal, the courts also ignored this Court's precedent. App. 45a-46a, 50a. Regarding the illegal arrest of Mr. Garza, the decisions below completely avoid the issue, incorrectly accusing Ms. Dempére of not citing any authority to support the conclusion that Mr. Garza was illegally arrested, App. 12a-13a, 21a, when in fact Ms. Dempére thoroughly briefed this issue. App. 37a-41a, 47a-49a.

As noted above, Ms. Dempére may not be "in custody" for purposes of filing a federal writ of habeas corpus. The only option left for her to obtain a remedy for the violation

of her First Amendment rights is review in this Court.[3] The decisions of the Washington courts conflict with this Court's First Amendment cases, as well as the decisions from other state and federal courts. Review should be granted under Rule 10(b) & (c).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

NEIL M. FOX
Attorney for Petitioner
COHEN & IARIA
1008 Western Ave., Suite 302
Seattle, WA 98104
(206) 624-9694

July 25, 2005

[3] Other people who also have been charged with obstruction-type offenses for verbally challenging illegal police behaviors are unlikely to be "in custody" by the time they exhaust state remedies, and would also be unlikely to go to federal court for habeas relief. Review in this Court is the only option left to vindicate federal constitutional rights.

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APPENDIX A

DO NOT CITE. SEE RAP 10.4(h).

Court of Appeals Division I
State of Washington

Opinion Information Sheet

Docket Number: 52925-1-I
Title of Case: Personal Restraint Petition of Jackie Dempere
File Date: 10/18/2004

SOURCE OF APPEAL

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JUDGES

Ronald E. Cox

Susan R. Agid

William W. Baker

COUNSEL OF RECORD

Counsel for Petitioner(s)
Neil Martin Fox
Cohen & Iaria
1425 Western Ave Ste 108
Seattle, WA 98101

Counsel for Respondent(s)
Kerri Ann Bergland
Kenyon Dornay Marshall PLLC
11 Front St S
Issaquah, WA 98027-3820

Sandra S. Meadowcroft
Kenyon Disend PLLC
11 Front St S
Issaquah, WA 98027-3820

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	) No. 52925-1-I)) DIVISION ONE
JACKIE DEMPERE,	) UNPUBLISHED OPINION)
Petitioner.	) FILED:

Per Curiam. Jackie Dempere has filed a personal restraint petition challenging her conviction in Tukwila Municipal Court for one count of obstructing a law enforcement officer. But in order to obtain collateral relief by means of a personal restraint petition, Dempere must demonstrate either an error of constitutional magnitude that gives rise to actual prejudice or a nonconstitutional error that inherently results in a "complete miscarriage of justice." *In re Personal Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Because she has failed to satisfy this burden, we deny the petition.

FACTS

Dempere was charged with obstructing a law enforcement officer in Tukwila Municipal Court following an incident on October 29, 1998, in which she allegedly interfered with several Tukwila police officers who had responded to a possible gang-related incident. Initially, the trial judge was the Hon. Peter Lukevich. Following a pretrial hearing on February 16, 1999, Dempere filed a complaint against Judge Lukevich with the Commission on Judicial Conduct. As a result of the complaint, Judge Lukevich signed an agreed order of admonishment, stipulating that he had used "an arguably harsh and inappropriate tone and manner of interaction" with Dempere at the pre-trial hearing. Judge Lukevich later recused himself from the case just before trial.

The case went to trial on October 29, 1999, but it ended in a mistrial. The City then dismissed the charge without prejudice and refiled it on the same day. When the case was retried in May 2000, the jury found Dempere guilty as charged. The Superior Court affirmed Dempere's conviction on a RALJ appeal, and this court denied discretionary review. After the Supreme Court also denied review, Dempere filed this personal restraint petition.

At trial, the City presented evidence that Tukwila police officers were sent to a possible fight at an apartment building on the evening of October 29, 1998. Officer James Syler, the first officer on the scene, encountered a large group of people milling around. While attempting to ascertain what had happened, Officer Syler encountered one man who said he had called 911. Because the man was "a little hysterical," Syler placed him in handcuffs.

At this point, Syler noticed Officer Craig Boyd struggling with another man a short distance away. From prior encounters, Officer Syler recognized the man as Ramon Garza. According to Syler, Garza had been violent during prior arrests and had assaulted an officer.

Officer Syler left the apparent victim and went over to assist Officer Boyd. Garza was yelling and cursing, but they eventually forced him to the ground and handcuffed him. Garza continued to struggle and kick, and it took at least three officers to restrain him and move him into a patrol car. Because Garza continued to kick in the patrol car, the officers eventually used pepper spray to subdue him.

While Officer Syler was assisting with Garza, he noticed Dempere cross the street and approach the officers. Syler told Dempere that she would have to move back across the street. Dempere moved back across the street, but approached the officers a short time later, coming within about five feet. Officer Syler, who saw that Dempere was holding a screwdriver, again told her that she needed to go back across the street. Dempere responded that she had not done anything wrong and that she did not have to comply. But she then moved back across the street. A short time later, Dempere once again crossed the street and approached the officers who were attempting to restrain Garza. According to Officer Syler, Dempere became angry at this point and told him that "this is America" and she "can do what she wants to do." When Dempere refused to comply with repeated orders to move away, Officer Syler arrested her for obstruction. Syler testified that he had to break away repeatedly from assisting with Garza and investigating the reported disturbance because of Dempere's interference.

Officers Shawn Robertson, Craig Boyd, and James Hicks generally corroborated Officer Syler's account. Officer Boyd testified that when he first responded to the reported disturbance, Ramon Garza had approached him with his hands in the pockets of his bulky jacket. Boyd recognized Garza from prior encounters with the police, including an assault, so he ordered Garza to remove his hands from his pockets. Garza refused and became belligerent. As the two men struggled, Garza went "out-of-control" and several officers tried to subdue him.

Officer Robertson testified that Dempere approached as he was attempting to frisk Garza for weapons. Dempere refused Robertson's repeated order to stay away from the officers. At some point, Robertson heard Dempere begin to speak Spanish with Garza.

Garza testified that on the evening of October 29, 1998, he had been returning from a store when he stopped to help a man who was being harassed. As Garza began walking home, two police cars drove up and the officers indicated that they needed to find out if he had any weapons. When he told the officers he did not have any weapons, they threw him to the ground. According to Garza, the officers punched him during the resulting struggle and gave him a black eye. Garza denied that he resisted in any manner. He also denied that he kept his hands in his pockets. Garza did not file a complaint about being punched in the eye.

Garza acknowledged that he had prior convictions for burglary and forgery. He admitted that he had pleaded guilty to resisting arrest and obstruction on October 30, 1998, but explained that he was not guilty and had entered a plea only to get out of jail earlier.

Dempere testified that she was working on the door locks of her house when she heard a loud scream nearby. She went out onto the street, still holding the screwdriver that she was using on the locks, and saw a man – later identified as Garza – on the ground, surrounded by three police officers. When Dempere asked what was happening, an officer told her to move back. As Dempere complied with the order and started moving back, she was able to see that Garza was handcuffed and that one of the officers was using a knee to hold Garza's head down.

Dempere was concerned that Garza would be injured or paralyzed and twice told the officers that they were hurting him as she moved back. One of the officers then approached her, walked her to a patrol car, and arrested her. Dempere maintained that she obeyed the order to move back and that she was more than 15 feet away from Garza when the officer approached her. She denied speaking to Garza in Spanish and explained she only wanted to let the officers know that they were being watched.

Officer Hicks testified on rebuttal that he did not punch Garza or give him a black eye. He maintained that Garza would not have been booked into the Regional Justice Center following his arrest if he had been injured because regulations require that he receive medical assistance.

The jury found Dempere guilty as charged. She originally received a suspended sentence. The sentence was eventually modified to eliminate any detention and community service time and to require only the payment of a fine.

ANALYSIS

The City initially argues that the imposition of a fine following Dempere's conviction does not constitute "restraint" and that this court should therefore not address the merits of Dempere's claims. Under RAP 16.4(a), an appellate court will grant relief by means of a personal restraint petition only if the petitioner can demonstrate unlawful "restraint." For purposes of RAP 16.4, a petitioner is under "restraint"

> if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, *or the petitioner is under some other disability* resulting from a judgment or sentence in a criminal case.

(Italics ours.) RAP 16.4(b). The City maintains that the "restraint" requirement in RAP 16.4 should be construed as analogous to the "in custody" requirement for federal habeas corpus relief. *See Williamson v. Gregoire*, 151 F.3d 1180 (9th Cir. 1998) (imposition of a fine and other "collateral" consequences of a conviction do not satisfy "in custody" requirements of federal habeas corpus relief under 28 U.S.C. sec. 2241(c)(3)).

But the federal requirements are based on statutory language that is not comparable to RAP 16.4(b). The City fails to address the language in RAP 16.4(b), which broadly defines restraint to include "some other disability resulting from a judgment or sentence in a criminal case." This provision has been construed to encompass the stigma associated with an unlawful conviction, even if there is no actual confinement. *See In re Personal Restraint of Powell*, 92 Wn.2d 882, 887-88, 602 P.2d 711 (1979). Accordingly, we reject the City's contention that

Dempere is not under restraint for purposes of RAP 16.4(b).

Dempere first contends that Judge Lukevich, who later recused himself from the case, violated her right to due process and her right to counsel at a pre-trial hearing on February 16, 1999, when he "forced" her to sign a speedy trial waiver. Dempere maintains that the waiver was therefore invalid and that the speedy trial period under CrRLJ 3.3 expired on March 31, 1999, before the charge was dismissed and refiled. But Dempere has provided no evidentiary support for her conclusory assertions.

The transcript of the hearing indicates that she appeared in court on February 16, 1999, without an attorney. Dempere's prior attorney had withdrawn on January 12, 1999, and she attempted to deliver to the judge a notice of appearance from her new attorney, who was not present, with an incorrect cause number on it. Dempere also attempted to make what appeared to be a pro se discovery request. She eventually signed a speedy trial waiver to May 30, 1999.

The waiver that Dempere signed recited, among other things, that she had the right to be tried within 90 days of her arraignment and that unless she waived that right, the case would be dismissed with prejudice if the trial did not occur during that period. During the course of the hearing, Dempere responded "that will be fine" when asked if she wanted a continuance. She also expressly acknowledged that she had executed speedy trial waivers before and that she understood what the waiver was. The record contains no declaration from Dempere or any other evidence that would support an inference that the judge coerced her into signing the waiver against her will. *See In*

re Personal Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

In sum, Dempere has failed to make any showing that the trial judge's inappropriate behavior during the hearing "forced" her to sign the speedy trial waiver or otherwise violated her due process rights or right to counsel. It should be noted that at the time Dempere signed the waiver on February 16, 1999, the speedy trial expiration date was March 31, 1999. The record shows that Dempere appeared in court with new counsel on March 16, 1999, and executed another speedy trial waiver to June 30, 1999. Petitioner does not allege that this (or any subsequent) waiver was coerced or otherwise invalid.[1] Consequently, petitioner has failed to identify any basis for relief.

Dempere next contends that the trial court violated her constitutional right to a unanimous jury when it failed to give a unanimity instruction. When the State presents evidence of multiple distinct criminal acts, any one of which could form the basis for a single charge, the State must either "elect" the specific incident upon which it relies for conviction or the jury must be instructed that all members must agree that the same criminal act has been proven beyond a reasonable doubt. *State v. Camarillo*, 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990). The failure to give a unanimity instruction when required is a constitutional error that is not harmless if a rational trier of fact could have had a reasonable doubt as to whether each incident

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[1] Because we have rejected Dempere's arguments on their merits, we do not address the City's claim that Dempere cannot challenge the voluntariness of the waiver because the case was subsequently dismissed without prejudice. *See State v. Taylor*, 150 Wn.2d 599, 80 P.3d 605 (2003).

established the crime. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

Under RCW 9A.76.020(1), the City was required to prove, among other things, that Dempere willfully hindered, delayed, or obstructed "*any*" law enforcement officer. As set forth in Instruction No. 4, however, the City was required to prove that Dempere obstructed "*a* law enforcement officer in the discharge of *the* law enforcement officer's official powers or duties," that she knew "*the* law enforcement officer" was discharging official duties at the time, and that she knew her conduct would obstruct "*the* law enforcement officer." (Emphasis ours.)

Dempere maintains that under these instructions, the jury was required to find that one specific officer – "the" law enforcement officer – was a "victim" of the obstruction. *See State v. Stephens*, 93 Wn.2d 186, 191, 607 P.2d 304 (1980) (assault instruction that alleged one offense against two named victims in the disjunctive violated constitutional right to jury unanimity). She reasons that because all four testifying officers performed different roles and described the incident from different perspectives, the jurors might have disagreed about which officer was obstructed.

In a direct appeal, constitutional error is presumed prejudicial, and the State bears the burden of demonstrating that the error was harmless beyond a reasonable doubt. *In re Personal Restraint of Benn*, 134 Wn.2d 868, 940, 952 P.2d 116 (1998). But because this is a personal restraint petition, Dempere bears the burden of demonstrating constitutional error that worked to her "actual and substantial prejudice, even if the error could not have been considered harmless beyond a reasonable doubt on

direct review." *In re Personal Restraint of Smith*, 117 Wn. App. 846, 859, 73 P.3d 386 (2003).

The evidence was essentially uncontroverted that the officers responded to a reported disturbance or possible fight at an apartment building. Upon arriving, all four officers initially attempted to ascertain what had happened, before becoming involved in the altercation with Garza. Although Dempere correctly states that the officers performed different roles, all four officers were drawn away from investigating the initial report and were working together in an effort to restrain and arrest Garza when the alleged obstruction occurred. Under the circumstances, there was no reasonable likelihood that a rational trier of fact could have rejected Dempere's testimony without also finding that any obstruction of one officer necessarily obstructed all four officers who were involved in the same ongoing investigation. Consequently, Dempere has failed to demonstrate prejudice even if we assume that Instruction No. 4 required the jury to find that she obstructed a specific officer or "victim." *See State v. Kitchen*, 110 Wn.2d at 413-14 (petitioner failed to demonstrate actual prejudice resulting from failure to give unanimity instruction).

Dempere next contends that the evidence was insufficient to support her conviction for obstructing a law enforcement officer. Tukwila Municipal Code 8.60.010 has adopted RCW 9A.76.020(1), which provides:

> A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

Dempere argues that because the police officers first harassed and then unlawfully detained Garza, the evidence failed to establish that the officers were discharging their official powers or duties. She further argues that she was denied effective assistance when counsel failed to challenge the sufficiency of the evidence on appeal.

The evidence established that Tukwila police officers were investigating a reported disturbance or possible fight when a man, later identified as Ramon Garza, approached one of the officers. Garza, who had previously threatened and assaulted an officer, refused to take his hands out of his bulky coat pockets. Garza then got into an altercation with the officers.

While the officers attempted to subdue Garza, Dempere approached them, holding a screwdriver, and questioned their treatment of Garza. Despite being repeatedly told by the officers to stay on the other side of the street, Dempere approached the officers several times as they struggled with Garza. When she refused to back off and continued walking toward the officers, they arrested her. The officers testified that Dempere's actions interrupted their attempts to restrain Garza and to investigate the initial reported disturbance.

Viewed in the light most favorable to the City, these circumstances were sufficient to permit the jury to find beyond a reasonable doubt that Dempere willfully hindered, delayed, or obstructed the officers in the discharge of their official duties and that the officers had lawfully detained Garza. *See State v. Ware*, 111 Wn. App. 738, 744, 46 P.3d 280 (2002) (evidence that defendant, despite warnings, repeatedly approached and challenged uniformed officers who were attempting to arrest another suspect was

sufficient to support conviction for obstruction). Dempere has not cited any authority to support her conclusory assertion that Garza was illegally detained and arrested as a matter of law. Because the evidence was sufficient to support Dempere's conviction, her counsel was not deficient for failing to challenge the sufficiency of the evidence on direct appeal.

Dempere next contends that her right to due process was violated when the deputy prosecutor used an "uncounselled" guilty plea to impeach Garza. It is undisputed that Garza pleaded guilty to both obstruction and resisting arrest for the incident involving Dempere. Garza acknowledged during his testimony that he had pleaded guilty to obstruction, but initially had difficulty recalling whether he had also pleaded guilty to resisting arrest. For this reason, the deputy prosecutor, without objection, showed Garza a copy of his statement on plea of guilty. Garza then acknowledged that he had also pleaded guilty to resisting arrest. When Garza then explained that he had done nothing wrong and had pleaded guilty only in order to get out of jail earlier, the deputy prosecutor questioned him further about the guilty plea.

Dempere relies on the general proposition that a prior conviction is not admissible for purposes of impeachment or enhancement of punishment if the defendant was not afforded counsel or did not make a valid waiver of counsel. *See State v. Weygandt*, 20 Wn. App. 599, 607, 581 P.2d 1376 (1978). But the mere fact that Garza was not represented by counsel at his guilty plea does not automatically invalidate his conviction, as Garza had a constitutional right to proceed pro se. The statement of defendant on plea of guilty Garza signed recites that he was informed and fully understood that he had a right to counsel. Because

Dempere has not submitted any evidence suggesting an invalid waiver, she has failed to sustain her burden of demonstrating actual prejudice for purposes of a personal restraint petition. Dempere next contends that the deputy prosecutor committed reversible misconduct during closing argument by making a "golden rule" argument and by informing the jury that it was "Officer Memorial Week for officers dying in the line of duty." Dempere also argues that her attorney was ineffective for failing to object to the remarks and for failing to raise the issue on direct appeal.

During closing argument, the deputy prosecutor stated:

> And I ask you as jurors to put yourself in the shoes of these police officers in what you perceived, how you reacted and your heightened sense of awareness.

RP 770. Dempere argues that this was an impermissible "golden rule" argument.

"[W]hether made by plaintiff's counsel or defendant's counsel, an argument in a civil case is improper which appeals to the jurors to place themselves in the position of a litigant and to decide the case based upon what they would then want under the circumstances." *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 140, 750 P.2d 1257 (1988). Such a "golden rule" argument is improper to the extent that it encourages the jury to depart from neutrality and to decide the case "on the basis of personal interest and bias rather than on the evidence." *Adkins*, 110 Wn.2d at 139. Although the Supreme Court has approved a "golden rule" argument in the sentencing phase of a capital trial, it expressly declined to address the propriety of such arguments during the guilt phase. *State v. Rice*,

110 Wn.2d 577, 607, 757 P.2d 889 (1988). Other courts have applied the rule to criminal cases. *See Gomez v. State*, 751 So.2d 630, 632 (Fla. App. 1999); *Hayes v. State*, 512 S.E.2d 294, 297 (Ga. App. 1999); *State v. Carlson*, 559 N.W.2d 802, 812 (N.D. 1997); *United State v. Kirvan*, 997 F.2d 963 (1st Cir.1993).

In this case, the deputy prosecutor's suggestion to the jury to put themselves in the "shoes" of the police officers occurred several times, but mainly during a summary of the officers' testimony about their initial encounter with Garza, before Dempere appeared at the scene. The comments were part of the deputy prosecutor's attempt to draw reasonable inferences from the evidence rather than an attempt to encourage the jury to decide the case on the basis of personal interest and bias. Viewed in the context of the total argument and the issues in the case, there was no significant likelihood that the comments, even if improper, had any effect on the verdict. *See State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1996).

The deputy prosecutor's reference to "Officer Memorial Week for officers dying in the line of duty" occurred only once. The deputy prosecutor did not repeat the remark or ask the jurors to draw further inferences. Under the circumstances, we cannot say that the alleged misconduct had any effect on the outcome of the trial.

Dempere next contends that the jury instructions did not adequately protect her first amendment rights to challenge police misconduct. But it is not clear whether this contention is directed solely to an instruction given by the trial court or to the trial court's failure to give one of her proposed instructions. In any event, in a personal restraint petition, this court will not review issues previously raised

and rejected in a direct appeal unless the petitioner can demonstrate that the "ends of justice would be served by reexamining the issue." *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). A petitioner can satisfy this burden "by showing an intervening change in the law 'or some other justification for having failed to raise a crucial point or argument in the prior application.'" *In re Gentry*, 137 Wn.2d at 388 (quoting *In re Personal Restraint of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986)).

In this case, Dempere concedes that the instructional issues were raised and rejected in her direct appeal. On RALJ appeal, the superior court concluded that Instruction No. 5 was a proper statement of the law and did not prevent Dempere from arguing her theory of the case[2] and that the trial court did not err in failing to give Dempere's proposed instruction.[3] In her petition, Dempere presents no argument indicating that the court's analysis was flawed. Nor has she offered any meaningful legal argument to support her assertion that the absence of a transcript of portions of Garza's testimony prejudiced the appellate process. And she has not established that a judge of this court should have recused himself from the panel that declined to modify the commissioner's ruling denying discretionary review. Consequently, Dempere has failed to

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[2] Instruction No. 5 provided: "Absent a threat of serious bodily injury to the arrestee, a person is prohibited from interfering with an arrest made by a uniformed officer."

[3] The trial court declined to give the following instruction Dempere proposed: "Under the circumstances of this case, you are instructed that words alone are not sufficient to establish commission of the crime of obstructing a law enforcement officer."

make any showing that the "ends of justice" require a reexamination of the instructional issues.

Finally, Dempere contends she is entitled to a reference hearing for issues arising under *Brady v. Maryland*, 373 U.S. 83, 10 L. ed 2d 215, 83 S. Ct. 1194 (1963). She argues she should be permitted to discover evidence indicating misconduct in other cases by the Tukwila officers who were involved in Garza's arrest. In support of this contention, Dempere has submitted complaint logs (with the officers' names blacked out) that indicate the general nature of complaints made against the four officers and whether the complaints were sustained or not. Dempere maintains that the City was required to disclose this "exculpatory evidence" of "horrible misconduct" prior to trial and during the course of her direct appeal.

But Dempere has made no showing that the evidence of complaints against the four officers – including allegations of poor demeanor, use of excessive force, and one instance of "improper medical treatment" – would have affected her conviction. Although some complaints were sustained, others were not. Dempere also suggests the evidence would have supported Garza's claim that the officers used excessive force. But she has not demonstrated that allegations that officers used excessive force on other occasions would have been admissible in her case. Moreover, Dempere was permitted to cross-examine the officers extensively on the nature of the force they used on Garza, and she testified fully about her claims that the force used was improper. Under the circumstances, Dempere has failed to demonstrate actual and substantial prejudice arising from the alleged error.

Petition denied.

For the court:

APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Personal Restraint of:	**No. 52925-1-I**
JACKIE DEMPERE,	**ORDER DENYING MOTION FOR RECONSIDERATION**
Petitioner.	

(Filed Dec. 8, 2004)

Petitioner, Jackie Dempere, having filed a motion for reconsideration of the opinion filed October 18, 2004, and the court having determined that said motion should be denied; Now, therefore, it is hereby

ORDERED that petitioner's motion for reconsideration is denied.

DATED this 8th day of December 2004.

FOR THE COURT:

/s/ Agid, J.
Presiding Judge

APPENDIX C

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of JACKIE DEMPERE, Petitioner.	No. 76482-4 RULING DENYING REVIEW (Filed Feb. 24, 2005)

Jackie Dempere was convicted in Tukwila Municipal Court of obstructing a police officer. The King County Superior Court affirmed the conviction and both Division One of the Court of Appeals and this court denied discretionary review. Ms. Dempere timely filed a personal restraint petition in the Court of Appeals. In an unpublished, per curiam opinion, the court denied the petition. Ms. Dempere now seeks this court's discretionary review. RAP 16.14(c); RAP 13.5.

To obtain relief by personal restraint petition, Ms. Dempere must show that she was actually and substantially prejudiced by constitutional error or that nonconstitutional error inherently resulted in a complete miscarriage of justice. *In re Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). And to obtain this court's review, Ms. Dempere must demonstrate that the Court of Appeals obviously or probably erred or significantly departed from the usual course of proceedings. RAP 13.5(b). She meets none of these burdens.

Ms. Dempere first argues that the original trial judge deprived her of her right to counsel and violated her due process rights by forcing her, without counsel, to waive her rule-based speedy trial deadline. But Ms. Dempere appeared at a pretrial hearing without counsel, seeking to

present a notice of appearance on her new attorney's behalf (captioned with the wrong cause number) and attempting to make what appeared to be a discovery request. The judge reasonably asked her if she wanted a continuance so that her attorney could make a proper appearance and make the appropriate discovery requests. She then signed a waiver of the speedy trial deadline. Although the judge spoke in a harsh and inappropriate manner toward Ms. Dempere, leading to his admonishment, the Court of Appeals correctly concluded that there was no evidence the judge forced Ms. Dempere to waive her speedy trial rights.

Ms. Dempere next contends that the trial court erred in failing to give a unanimity instruction in the face of evidence that she may have obstructed any of four police officers at the scene. But Ms. Dempere does not show that the Court of Appeals erred in determining that her obstruction of any one officer necessarily obstructed all four officers. In connection with this claim, Ms. Dempere argues that, because the State bears the burden on direct appeal of showing the error was harmless, appellate counsel was prejudicially ineffective in failing to raise this issue on appeal. But Ms. Dempere does not show that the unanimity claim would have been any more successful on direct appeal. *See Lord*, 123 Wn.2d at 314 (must show merit of underlying legal issue that should have been raised on appeal and then demonstrate prejudice).

Next, Ms. Dempere contends that the evidence of guilt was insufficient. But she bases her argument on her assertion that the arrest with which she interfered was unlawful. She does not show that the arrest was necessarily unlawful.

Ms. Dempere next claims that her due process rights were violated in connection with a defense witness. The person whose arrest Ms. Dempere obstructed later pleaded guilty to obstruction and resisting arrest. While testifying in Ms. Dempere's defense, he could not at first recall whether he had pleaded guilty to resisting arrest. The prosecutor therefore presented him on cross-examination with his guilty plea statement. Ms. Dempere urges that a prior guilty plea is inadmissible for impeachment purposes if the defendant was not afforded counsel or did not validly waive counsel. *See State v. Weygandt*, 20 Wn. App. 599, 607, 581 P.2d 1376 (1978). This witness was not represented by counsel in his guilty plea. But Ms. Dempere fails to show that he did not validly waive his right to counsel. Nor, in any event, does she demonstrate actual and substantial prejudice.

Ms. Dempere also argues that the prosecutor committed misconduct in closing argument by suggesting to the jurors that they try to view the situation from the police officers' perspective. Ms. Dempere contends that this was an improper "golden rule" argument (telling the jurors to consider what result they would want if they were one of the litigants). But she does not show the Court of Appeals obviously or probably erred in holding that, under totality of the circumstances, there was no significant likelihood that these remarks, even if improper, affected the verdict.

Ms. Dempere next contends that the trial court violated her First Amendment rights by refusing to instruct the jury that words alone are insufficient to establish the crime of obstructing a police officer. But the Court of Appeals rejected this argument on direct appeal, and here it found no reason in the interests of justice to reexamine the issue. *See Lord*, 123 Wn.2d at 303. Ms. Dempere does not demonstrate otherwise.

Finally, Ms. Dempere argues that the Court of Appeals should have ordered a reference hearing on the failure to disclose evidence of complaints against the officers involved in this case. But again, Ms. Dempere fails to show that the Court of Appeals obviously or probably erred in its treatment of this issue, or that any error actually and substantially prejudiced her or resulted in a complete miscarriage of justice.

In sum, Ms. Dempere does not demonstrate that the Court of Appeals decision merits this court's review. Accordingly, the motion for discretionary review is denied.

/s/ Geoffrey Crooks
COMMISSIONER

February 24, 2005

APPENDIX D

THE SUPREME COURT OF WASHINGTON

Personal Restraint Petition of)	**ORDER**
JACKIE DEMPERE,)	No. 76482-4
Petitioner.)	C/A No. 52925-1-I

(Filed May 3, 2005)

Department II of the Court, composed of Chief Justice Alexander and Justices Madsen, Bridge, Owens and J. M. Johnson, considered this matter at its May 3, 2005, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify the Commissioner's Ruling is denied.

DATED at Olympia, Washington this 3rd day of May, 2005.

For the Court

/s/ Gerry L. Alexander
CHIEF JUSTICE

APPENDIX E

IN THE MUNICIPAL COURT FOR THE CITY OF TUKWILA, WASHINGTON

CITY OF TUKWILA.)	**CAUSE NO.**
Plaintiff,)	CR27909A & _____ &
)	_____
vs.)	
Dempere, Jackie L.)	
)	
_____)	
Defendant)	**JUDGEMENT AND SENTENCE**

The above named defendant having been found guilty and now appearing for sentencing, the Court does hereby make and enter the following JUDGEMENT, SENTENCE, AND ORDER:

COUNT I: Upon the charge of Obstruct Justice, the defendant is sentenced to 365 days in jail, with 335 days suspended for a period of ☐ 1 year, ☒ 2 years and/or; pay a fine in the amount of $5000 with $4400 suspended for a period of ☐ 1 year, ☒ 2 years.

COUNT II: Upon the charge of _____, the defendant is sentenced to: _____ days in jail, with _____ days suspended for a period of ☐ 1 year, ☐ 2 years and/or; pay a fine in the amount of $_____ with $_____ suspended for a period of ☐ 1 year, ☐ 2 years.

COUNT III: Upon the charge of _____, the defendant is sentenced to: _____ days in jail, with _____ days suspended for a period of ☐ 1 year, ☐ 2 years and/or; pay a fine in the amount of $_____ with $_____ suspended for a period of ☐ 1 year, ☐ 2 years.

ALL SUSPENSIONS OF JAIL TIME AND/OR FINES ARE CONDITIONED DURING THE FULL TERM OF THIS SENTENCE UPON FULL AND EXACT COMPLIANCE WITH THE FOLLOWING CONDITIONS:

Defendant shall:

1. (X) Have no violations of state, local or federal criminal laws, or traffic laws, other than minor infractions.

2. (X) Notify this Court of any change in residence or mailing address within one business day of such change becoming effective.

3. (X) Not drive without a valid driver's license and insurance or have any alcohol-related offenses.

4. ( ) Complete a drug and alcohol evaluation within _____ days and file proof of same with Court, and complete a follow-up treatment as recommended.

5. ( ) Complete Driver Improvement School within _____ days and file proof of same with Court.

6. ( ) Complete ADIS within _____ days and file proof of completion with Court.

7. ( ) Attend AA/NA meetings _____ times weekly for _____ months or as recommended by treatment agency and file proof of same with Court.

8. ( ) Attend consumer awareness class (CAP) within _____ days and file proof of same with Court.

9. ( ) Complete certified DV program of not less than 12 months in duration within _____ days and file proof of same with court.

10. ( ) Complete Anger Management course of _____ hours and file proof of same with Court.

11. ( ) Complete HIV test within ☐ 30 days, ☐ 60 days, ☐ 90 days, and file proof of same with Court.

12. ( ) Defendant is eligible for ☐ Electronic Home Monitoring (EHM) or ☐ Work Release, which shall commence NLT _____. If defendant is deemed ineligible for EHM and/or work release, confinement shall commence at the RJC NLT _____. EHM shall be performed through the Renton Jail.

13. ( ) Defendant shall forfeit all weapons related to this incident within _____ hours to the Tukwila Police Dept.

14. ( ) Defendant shall forfeit all firearms in his/her possession within _____ hours to the Tukwila Police Dept.

15. ( ) Pay $_____ to the City of Tukwila for public defense screening costs.

16. (X) Pay probation fees of ☐ $50 per year, or ☒ $100 ~~per year~~ total, or ☐ $_____ per month for _____ months to the Tukwila Municipal Court.

17. (X) Perform 120 hours of community service within 24 months ~~days~~, and file proof of same with Court.

18. ( ) Abide by terms of a ☐ S.O.A.P. Order, ☐ S.O.D.A. Order, ☐ No Contact Order, issued on the date of sentencing.

19. ( ) Pay restitution in the amount of _____ to the Tukwila Municipal court who shall forward payment to the victim.

20. ( ) Sentence of defendant is deferred for _____ conditioned upon full and exact compliance with the above conditions for the full term of this sentence.

21. ( ) Total amount of cost/fines upon deferred sentence: ☐ $_____ due by _____, or ☒ time pay is authorized at ☐ $50 per month, or ☐ $_____ per month.

22. (X) Appear for review at such time as directed by the Court.

/s/ Jackie L. Dempere	/s/ Albert Raines	5/21/00
Defendant's signature acknowledges receipt and understanding of this order	*Judge's Signature*	*Date*

NOTE: A failure to meet any of the conditions checked off on this order may result in the filing of additional criminal charges, the issuance of a bench warrant for your immediate arrest, and the revocation of your suspended or deferred sentence. If the suspended or deferred sentence is revoked because of a failure to meet the said conditions, you are subject to the imposition of the maximum jail sentence and fine permitted by law or such portion thereof as the Court deems appropriate.

APPENDIX F

IN THE MUNICIPAL COURT FOR THE CITY OF TUKWILA, WASHINGTON

CITY OF TUKWILA.)	**CAUSE NO.**
Plaintiff,)	CR[illegible]909A & _____ &
)	_____
vs.)	
)	
JACKIE DEMPERE)	
)	
_____)	
Defendant)	**JUDGEMENT AND SENTENCE**

The above named defendant having been found guilty and now appearing for sentencing, the Court does hereby make and enter the following JUDGEMENT, SENTENCE, AND ORDER:

COUNT I: Upon the charge of Obstruct Justice, the defendant is sentenced to: 1 days in jail, with _____ days suspended for a period of ☐ 1 year, ☐ 2 years and/or; pay a fine in the amount of $600 with $_____ suspended for a period of ☐ 1 year, ☐ 2 years.

COUNT II: Upon the charge of _____, the defendant is sentenced to: _____ days in jail, with _____ days suspended for a period of ☐ 1 year, ☐ 2 years and/or; pay a fine in the amount of $_____ with $_____ suspended for a period of ☐ 1 year, ☐ 2 years.

COUNT III: Upon the charge of _____, the defendant is sentenced to: _____ days in jail, with _____ days suspended for a period of ☐ 1 year, ☐ 2 years and/or; pay a fine in the amount of $_____ with $_____ suspended for a period of ☐ 1 year, ☐ 2 years.

ALL SUSPENSIONS OF JAIL TIME AND/OR FINES ARE CONDITIONED DURING THE FULL TERM OF THIS SENTENCE UPON FULL AND EXACT COMPLIANCE WITH THE FOLLOWING CONDITIONS:

Defendant shall:

1. ( ) Have no violations of state, local or federal criminal laws, or traffic laws, other than minor infractions.

2. ( ) Notify this Court of any change in residence or mailing address within one business day of such change becoming effective.

3. ( ) Not drive without a valid driver's license and insurance or have any alcohol-related offenses.

4. ( ) Complete a drug and alcohol evaluation within _____ days and file proof of same with Court, and complete a follow-up treatment as recommended.

5. ( ) Complete Driver Improvement School within _____ days and file proof of same with Court.

6. ( ) Complete ADIS within _____ days and file proof of completion with Court.

7. ( ) Attend AA/NA meetings _____ times weekly for _____ months or as recommended by treatment agency and file proof of same with Court.

8. ( ) Attend consumer awareness class (CAP) within _____ days and file proof of same with Court.

9. ( ) Complete certified DV program of not less than 12 months in duration within _____ days and file proof of same with court.

10. ( ) Complete Anger Management course of _____ hours and file proof of same with Court.

11. ( ) Complete HIV test within ☐ 30 days, ☐ 60 days, ☐ 90 days, and file proof of same with Court.

12. ( ) Defendant is eligible for ☐ Electronic Home Monitoring (EHM) or ☐ Work Release, which shall commence NLT _____. If defendant is deemed ineligible for EHM and/or work release, confinement shall commence at the RJC NLT _____. EHM shall be performed through the Renton Jail.

13. ( ) Defendant shall forfeit all weapons related to this incident within _____ hours to the Tukwila Police Dept.

14. ( ) Defendant shall forfeit all firearms in his/her possession within _____ hours to the Tukwila Police Dept.

15. ( ) Pay $_____ to the City of Tukwila for public defense screening costs.

16. ( ) Pay probation fees of ☐ $50 per year, or ☐ $100 month total, or ☐ $_____ per month for _____ months to the Tukwila Municipal Court.

17. ( ) Perform _____ hours of community service within _____ days, and file proof of same with Court.

18. ( ) Abide by terms of a ☐ S.O.A.P. Order, ☐ S.O.D.A. Order, ☐ No Contact Order, issued on the date of sentencing.

19. ( ) Pay restitution in the amount of _____ to the Tukwila Municipal court who shall forward payment to the victim.

20. ( ) Sentence of defendant is deferred for _____ conditioned upon full and exact compliance with

the above conditions for the full term of this sentence.

21. ( ) Total amount of cost/fines upon deferred sentence: ☐ $_____ due by _____, or ☐ time pay is authorized at ☐ $50 per month, or ☐ $_____ per month.

22. ( ) Appear for review at such time as directed by the Court.

/s/ Jackie L. Dempere — *Defendant's signature acknowledges receipt and understanding of this order*

/s/ Albert Raines — *Judge's Signature*

1/14/03 — *Date*

NOTE: A failure to meet any of the conditions checked off on this order may result in the filing of additional criminal charges, the issuance of a bench warrant for your immediate arrest, and the revocation of your suspended or deferred sentence. If the suspended or deferred sentence is revoked because of a failure to meet the said conditions, you are subject to the imposition of the maximum jail sentence and fine permitted by law or such portion thereof as the Court deems appropriate.

APPENDIX G

IN THE MUNICIPAL COURT OF THE
CITY OF TUKWILA
KING COUNTY, WASHINGTON

CITY OF TUKWILA,

Plaintiff,

V.

DEMPERE, JACKIE L.,

Defendant.

NO. CR27909A

COURT'S INSTRUCTIONS TO THE JURY

DATED: May 21, 2000

/s/ Albert M. Raines
ALBERT M. RAINES,
JUDGE PRO-TEM

* * *

INSTRUCTION NO. 5

Absent a threat of serious bodily injury to the arrestee, a person is prohibited from interfering with an arrest made by a uniformed police officer.

APPENDIX H

IN THE MUNICIPAL COURT
OF THE CITY OF TUKWILA

CITY OF TUKWILA,

Plaintiff,

Vs. **No CR0023205 TKP**

JACKIE DEMPERE,

Defendant.

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS – May 21, 2000

The Hon. Albert Raines, Judge, Pro Tempore, Presiding
APPEARANCES:

For the City of Tukwila	Margita Dornay City Attorney
For Jackie Dempere	Charles Hamilton Attorney at Law

[pp. 755-757] Mr. Hamilton: "I have one more objection to the court's new instruction."

Judge: "Which one?"

Mr. Hamilton: "That would be five, was four now five. Court's instruction number five, the court's new confession with regard to Holman."

Judge: "Okay."

Mr. Hamilton: "That instruction gives no clarity, no clarification, as to what constitutes interfering, none at all. It just says you're prohibited from interfering. That

doesn't charge the statute, that doesn't reflect the law, that does not describe what interfering is and what interfering is not. And therefore if nothing else it constitutes where words may constitute the only interference a charge to the jury that does not take into consideration first amendment rights and therefore by its own broad based definition embraces speech, embraces first amendment rights, constitutes a prior restraint and cannot be used. There's no definition here anywhere of interference."

Judge: "So is there a, I find that interference to interfere is something with which the jurors can use their common knowledge for. There is also no definition of delay under the statute or hindered."

Mr. Hamilton: "That in itself doesn't make much difference when it's a brand new instruction which gives you is a carte blanche vague instruction which does not, as I say, at least eliminate simply the exercise of first amendment rights."

Judge: "City?"

Ms. Dornay: "Interfering should be has to be interpreted for the regular meaning and if the court wants to insert a "Webster" definition of interfering it [sic] pretty self explanatory and these instructions are not read in a vacuum. They're read in conjunction with the other instructions which would include the definition of obstruction and also the definition of willfully and as I said it's not read in a vacuum. It's read in conjunction with the rest of the instructions is fairly obvious to what the definition means."

Judge: "I find that the common instruction complies with the requirements in State versus Long.

First of all with the instructions read as a whole, the first element, second instruction that it allows each party to argue their case and it does. Each party has arguments that are not prevented by this instruction. And third it does not misstate the law. It's taken word for word out of Holman. Any further objections?"

APPENDIX I

No. 52925-1-I

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION ONE

IN RE THE RESTRAINT OF:

JACKIE DEMPERE,

Petitioner.

OPENING BRIEF OF PETITIONER

NEIL M. FOX
WSBA #15277
Attorney for Petitioner

COHEN & IARIA
1425 Western Ave. Suite 108
Seattle WA 98101

Phone: 206-624-9694
Fax: 206-624-9691
e-mail: nmf@cohen-iaria.com

* * *

2. <u>There Is Insufficient Evidence to Sustain a Conviction</u>

Officer Syler arrived at the scene of a reported disturbance. He located the victim of some offense and because the victim was excited, and perhaps because of language barriers, Officer Syler handcuffed the victim. Officer Boyd

arrived and saw Roman Garza walking by. Without even knowing if a crime had occurred and what Mr. Garza's purported involvement was (and as it turned out, without knowing that Mr. Garza was a peacemaker), Officer Boyd ordered that Mr. Garza remove his hands from his jacket and stop walking away. When Mr. Garza refused to stop, Officer Boyd arrested Mr. Garza, and with force and violence, and with Officer Syler's and Officer's Robertson's assistance, threw Garza against a car, pulled him to the ground, put knees on his neck, handcuffed him, punched him in the eye, threw him in the car, and repeatedly sprayed him with pepper spray.

It is lucky for Mr. Garza that Ms. Dempere lived nearby and heard his screams, and verbally challenged the police. Without her involvement, it is quite likely that Mr. Garza could easily have been severely injured. Ms. Dempere had the courage to challenge verbally police misconduct in her neighborhood. She is guilty of no offense.

Tukwila has adopted the RCW definition of obstruction by reference. Tukwila Municipal Code 8.60.010. RCW 9A.76.020 provides:

> A person is guilty of obstructing a law enforcement officer if the person wilfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

The relevant test for sufficiency of evidence under the 14th Amendment is "whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt.*" *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (Wash. Sup. Ct.'s

emphasis), *quoting Jackson v. Virginia*, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S. Ct. 2781 (1979).

This standard is not met in an obstruction case if a person hinders, delays or obstructs an officer who is not acting in the discharge of his or her official powers and duties. Obviously, a police officer has no right to harass innocent people and arrest them, slam them against patrol cars, throw them to the ground unless such actions are constitutional – i.e. comport with the 4th Amendment and Wash. Const. art. 1, § 7. An officer who engages in such behavior is not acting in the discharge of his or her official power and duties – quite the contrary. The officer's official powers and duties are to enforce and uphold the law, not to violate the Constitution.

Even if some sort of good faith standard is applied, as is suggested by *State v. Hudson*, 56 Wn. App. 490, 784 P.2d 533 (1990), a law enforcement officer acts in bad faith and does not discharge his or her official powers and duties, if he or she knew *or reasonably should have known* that the action he or she took would violate the constitutional rights of the person affected or if he or she took the action with the malicious intention to cause a deprivation of constitutional rights or other injury. *Hocker v. Woody*, 95 Wn.2d 822, 825, 631 P.2d 372 (1981); *State v. Groom*, 80 Wn. App. 717, 722 n.2, 911 P.2d 403 (1996), *rev'd on other grounds*, 133 Wn.2d 679 (1997).[1]

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[1] Whatever *Hudson* may suggest, the law cannot be that one is guilty of obstruction every time one disobeys an unlawful order by police officer. Certainly, there are circumstances where one has a constitutional right to continue engaging in certain acts – i.e. certain controversial speech activities – even though a police officer gives an order to cease. Yet, one cannot be guilty of obstruction for disobeying an

(Continued on following page)

In the instant case, even taking the evidence in the light most reasonable to the police, no reasonable police officer would think that he or she had the right to detain Mr. Garza. The officers had no information that a crime had actually occurred, or that Mr. Garza was in any way suspected of criminal activity. Accordingly, any reasonable police officer in 1998 should have known that they had no right to stop Mr. Garza, detain him or demand to see his hands. *See State v. Thompson*, 93 Wn.2d 838, 613 P.2d 525 (1980) (mere proximity to others suspected of misconduct does not justify stop).

Since Mr. Garza had the right not to be detained, under U.S. Const. amend. 4 and Wash. Const. art. 1, § 7, he had the right to walk away, *State v. Nettles*, 70 Wn. App. 706, 709, 855 P.2d 609 (1993), and could not be accosted and thrown to the ground simply because he did not want to cooperate with an illegal search. Any subsequent arrest of Mr. Garza was illegal and *he* should not have been charged with or convicted of resisting arrest or obstruction for his lack of cooperation. *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999).[2]

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unconstitutional order to cease constitutionally protected activities. *See, e.g. Gulliford v. Pierce County*, 136 F.3d 1345 (9th Cir. 1998) (verbal protests to police constitutionally protected even if they hinder or delay officer). *See also Seattle v. Lewis*, 70 Wn. App. 715, 720, 855 P.2d 327 (1993) (person cannot be guilty of obstruction unless officer is acting lawfully).

[2] Mr. Garza clearly made a poor choice when he pled guilty, without assistance of counsel, hoping to be released from jail. The City of Tukwila's failure to provide him with counsel when he pled guilty cannot, though, be used as evidence that Mr. Garza in fact was guilty of obstruction and resisting arrest. As Mr. Garza testified, people plead guilty all the time even though they are innocent, in the hope that by pleading guilty they will be released from custody. RP 607-08. While

(Continued on following page)

Ms. Dempere, then, had the right to challenge what the police were doing, even if they were temporarily hindered or delayed in effectuating their illegal arrest of Mr. Garza or their "investigation" of the handcuffed victim. They were not discharging any official duties and powers when they violated Mr. Garza's rights. They were in fact acting illegally and in bad faith. Accordingly, there was insufficient evidence to sustain a conviction for obstruction. The conviction should be vacated.[3]

* * *

6. The Jury Instructions Did Not Adequately Protect Ms. Dempere's First Amendment Rights

a. *A Person Has a Clear First Amendment Right to Challenge Police Misconduct*

Ms. Dempere had a 1st Amendment right to observe and verbally challenge police misconduct. The jury instructions, however – especially Instruction No. 5 (App. B) – failed to give the jurors proper guidance regarding this right, and allowed the jury to convict Ms. Dempere even if it concluded that her verbal challenges were appropriate in order to prevent the police from inflicting more injury to Mr. Garza than what actually occurred.

In *Houston v. Hill*, 482 U.S. 451, 96 L.Ed.2d 398, 107 S. Ct. 2502 (1987), the Supreme Court addressed a Houston ordinance which made it unlawful to "interrupt any

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Ms. Dornay mocked this testimony in her closing argument, RP 778, Mr. Garza's actions are fully understandable and, regrettably, all too common.

[3] Additionally, the failure to raise sufficiency on appeal denied Ms. Dempere of effective assistance of counsel on appeal, in violation of U.S. Const. amend. 14 and Wash. Const. art. I, secs. 3 & 22.

policeman in the execution of his duty." Mr. Hill had been charged under this ordinance after he shouted at police officers who had stopped friend and spoke with him. Hill attempted to "divert" the officers' attention from his friend and yelled "Why don't you pick on somebody your own size." One of the officers responded, "Are you interrupting me in my official capacity as a Houston police officer?" Hill then shouted, "Yes, why don't you pick on somebody my size?" 482 U.S. at 453-54. Hill was then arrested, but ultimately acquitted by a jury. He then filed a civil lawsuit on the issue of the constitutionality of the Houston ordinance.

The Supreme Court held that the ordinance was unconstitutionally overbroad in that it prohibited verbal challenges to the police, which were entitled to protection:

> [T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. "Speech is often provocative and challenging. . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

Houston v. Hill, 482 U.S. at 461, *quoting Terminiello v. Chicago*, 337 U.S. 1, 4, 93 L.Ed. 1131, 69 S. Ct. 894 (1949).

> The Court noted that verbally challenging police officers was a hallmark of a free society: The Constitution does not allow such speech to be made a crime. The freedom of individuals to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.

482 U.S. at 462-63.

Because the Houston ordinance criminalized verbal challenges to police actions, and was not limited to fighting words, "nor even to obscene or opprobrious language," 482 U.S. at 462, the ordinance was unconstitutionally overbroad and facially invalid.[4]

In *Gulliford v. Pierce County, supra*, the 9th Circuit construed Washington's obstruction in a § 1983 case, where an individual was arrested for telling an officer, trying to break up a crowd, "why don't you hop on the ferry, hop on the ferry and go back." 136 F.3d at 1347. When the officers arrested Mr. Gulliford, he filed a lawsuit. After losing to the jury, he appealed and challenged the following instruction:

> The First Amendment protects the right of citizens to verbally oppose and/or challenge police action without risking arrest so long as that challenge does not knowingly hinder, delay, or

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[4] *See also Wilson v. Kittoe*, ___ F.3d ___, 2003 U.S. App. LEXIS 14609 (4th Cir. 22 July 2003) (not obstruction under Virginia law for lawyer to offer assistance to arrestee); *L.A.T. v. State*, 650 So.2d 214 (Fla.App. 1995) (defendant had 1st Amendment right to yell to gathering crowd "police brutality, Rodney King style," as well as a series of swear words, at officers who were arresting his friend); *Cavazos v. State*, 455 N.Ed.2d 618 (Ind.App. 1983) (calling officer an "asshole" and continuing to debate the arrest of her brother by police protected speech); *State v. Janisczak*, 579 A.2d 736 (Me. 1990) (defendant had right to yell abusive names ("fucking assholes" and "jerks") and to yell "you don't have the right to do that" at officers making an arrest).

The right to challenge police misconduct is an important one – had the person who took the videotape of the police beating Rodney King done something more than just record the beating on tape, and had that person verbally challenged police actions, perhaps Rodney King would not have been beaten so badly.

> obstruct any public servant in the discharge of the public servant's official powers or duties.

136 F.3d at 1348.

The instruction Mr. Gulliford proposed stated:

> Defendants claim that they had probable cause to arrest plaintiff for obstructing a police officer in the conduct of his lawful duties. The First Amendment protects the right of citizens to verbally opposed and/or challenge police action so long as that challenge does not involve a threat or fighting words.

Id.

The Ninth Circuit reversed the verdict and held that Mr. Gulliford's instruction properly stated the law, and that the instruction actually given failed to comport with *Houston v. Hill, supra*:

> The facts before us are indistinguishable from those in *Hill* and its progeny. If anything, Gulliford's suggestion that Deputy Thrash "hop on the ferry" [footnote omitted] is less provocative than the "opprobrious language" found in those cases. Jury Instruction Number 15 misstates the law or is at best misleading since it does not state that under the First Amendment an individual cannot be arrested for mere speech unless the speech constitutes "fighting words." [citations omitted] We agree that Jury Instruction Number 15 was impermissibly misleading, warranting reversal unless the error was harmless.

136 F.3d at 350.

Ms. Dempere's case is indistinguishable from *Gulliford*, a case construing the same exact statute that her conviction was based on. Ms. Dempere did not need to wait until Mr. Garza was seriously injured before verbally challenging the violence taking place in front of her own house. She had a 1st Amendment right, under *Houston v. Hill, supra*, to challenge police misconduct, and had the right under *Gulliford* to have the jury properly instructed on this right. Instruction No. 5 does not conform to *Gulliford.*

b. *The Court Should Review the Instructional Error Despite the Issue Having Been Raised on Direct Appeal*

Ms. Dempere raised issues pertaining to instructional error on direct appeal, and both the superior court and this Court rejected her arguments. Ex 16, 18, 20. Normally, issues raised on direct appeal are not reviewed in collateral petitions unless the ends of justice would be served by reexamining the issue. *In re Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999).

Here, the ends of justice are served by reexamining the 1st Amendment issue for the following reasons:

First, neither the Commissioner's Ruling nor the RALJ decision ever discuss the 1st Amendment, *Houston v. Hill, supra*, or *Gulliford*, and thus provide no meaningful discussion of why the principles and holdings of those cases would not apply to Ms. Dempere's case. The 1st Amendment issues were therefore not adequately addressed in prior decisions and should now be examined fully.

Second, the direct appeal process was flawed by a series of procedural errors. Ms. Dempere' s attorney on the appeal failed to obtain a complete transcript of proceedings, and left out key portions of Mr. Garza's testimony. When the motion for discretionary review was made, counsel for Ms. Dempere failed to transmit to this Court a full copy of the transcript, transmitting only a few pages of the nearly thousand page original. This deficiency was noted both by the Commissioner of this Court, Ex. 18 at 6 n.9. Mr. Hamilton also failed to cite to the relevant RAP in his efforts to obtain discretionary review. Ex. 18 at 2 n.3.

Third, when Ms. Dempere moved to modify the Commissioner's Ruling, Judge Marlin Applewick was on the panel deciding the case. Judge Applewick was Judge Lukevich's former law partner, and like Judge Trickey in the superior court, should have recused himself from hearing the case.

In all, given the substantial 1st Amendment issues at stake, and the lack of full appellate review before, this Court should now consider the 1st Amendment issues.

APPENDIX J

No. 76482-4
COA NO. 52925-1-I

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

IN RE THE RESTRAINT OF:
JACKIE DEMPERE

Petitioner.

MOTION FOR DISCRETIONARY REVIEW

NEIL M. FOX
WSBA #15277
Attorney for Petitioner

COHEN & IARIA
1008 Western Ave. Suite 302
Seattle WA 98104

Phone: 206-624-9694
Fax: 206-624-9691
e-mail: nmf@cohen-iaria.com

* * *

4. <u>There Was Insufficient Evidence to Sustain a Conviction</u>

Ms. Dempere argued below that there was insufficient evidence to support a conviction under U.S. Const. amend. 14 because the police had no constitutionally valid reason for arresting Mr. Garza. The Court of Appeals rejected this argument and held that Ms. Dempere did not cite to any authority "to support her conclusory assertion that Garza was illegally detained and arrested as a matter of law."

Slip Op. at 11. The Court further cited *State v. Ware*, 111 Wn. App. 738, 46 P.3d 280 (2002), as authority that there was sufficient evidence to sustain a conviction.

Ware dealt with a juvenile who challenged police officers as they were arresting someone else "due to her threats to assault another individual." 111 Wn. App. at 240. Ms. Ware never challenged this fact, nor did she raise on appeal any issue about the legality of the police behavior, nor did she ever claim that she verbally challenged the police because of the excessive force they were using in effectuating the initial arrest. Thus, Ware is inapposite and has little to do with the situation that arose when the police here illegally arrested Mr. Garza and brutalized him.

Moreover, far from just making the "conclusory assertion" that the police illegally detained and arrested Mr. Garza, Ms. Dempere provided briefing and authority that the police could not arbitrarily detain him and search him, since he was not suspected of committing any offense, citing *State v. Thompson*, 93 Wn.2d 838, 613 P.2d 525 (1980); *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999), and *State v. Nettles*, 70 Wn. App. 706, 709, 855 P.2d 609 (1993). Opening Brief at 29-30. *See also* Reply Brief at 12-13 (citing 9th Circuit decision regarding excessive force); Supplemental Brief of Petitioner at 3-4 (discussing Mr. Garza's right to walk away from police).

The City's briefing never even addressed the authorities cited by Mr. Garza, and never attempted to distinguish cases such as *State v. Thompson*, *supra*, which clearly have held that simply being near another person suspected of a crime (or, for that matter, simply being near the victim of a crime) is not a sufficient basis to detain

someone by force. While the officers involved may have believed that there is a crime called "Being in Tukwila," the City never cited any authority to support that belief. *See* Ex. 30, Complaint No. 99-15; Supp. RP 41 (Mr. Garza's testimony that the officers told him "to leave the City of Tukwila or, or every time they see me, we are going to have problems.").

Here, the officers were not engaged in any official duties when they illegally detained Mr. Garza, who was a suspect in no offense, demanded to see what he had in his pockets, threw him to the ground, and then forcibly handcuffed him, sprayed him, blocked his breathing, and punched him in the eye. Such police conduct is not sanctioned under U.S. Const. amend. 4 or Wash. Const. art. 1, § 7. Thus, there cannot be sufficient evidence under the Due Process Clause of U.S. Const. amend. 14 to convict Ms. Dempere of obstruction. The Court of Appeals' decision to the contrary warrants relief under RAP 13.5.

* * *

6. <u>The Instructions Violated the First Amendment</u>

Ms. Dempere had a 1st Amendment right to observe and verbally challenge police misconduct. The jury instructions, however – especially Instruction No. 5 – failed to give the jury proper guidance regarding this right, and allowed the jury to convict Ms. Dempere even if it concluded that her verbal challenges were appropriate in order to prevent the police from inflicting more injury to Mr. Garza than what actually occurred. In this regard, the instructions did not adequately protect Ms. Dempere's federal right to challenge verbally [sic] police misconduct under *Houston v. Hill,* 482 U.S. 451, 96 L.Ed.2d 398, 107

S. Ct. 2502 (1987) and *Gulliford v. Pierce County,* 136 F.3d 1345 (9th Cir. 1998).

The Court of Appeals rejected this argument because it concluded that Ms. Dempere did not show a reason why the issue should be revisited after she previously challenged the instructions on direct appeal. Slip Op. at 13-14. However, the decisions on direct appeal (from the RALJ court and the Court of Appeals), never meaningfully discussed the First Amendment or any federal cases such as *Houston v. Hill* or *Gulliford,* and thus provided no real discussion of why the federal constitutional principles and holdings of those cases would not apply to Ms. Dempere's case. The 1st Amendment issues were therefore not adequately addressed in prior decisions. By refusing to consider the 1st Amendment issues, the Court of Appeals committed obvious or probable error, justifying relief under RAP 13.5

* * *

APPENDIX K

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT OF, JACKIE DEMPERE, Petitioner.	)))))	CAUSE NO. 76482-4 MOTION TO MODIFY COMMISSIONER'S RULING

* * *

c. There Was Insufficient Evidence to Support a Conviction

The Commissioner summarily rejected Ms. Dempere's sufficiency argument by stating: "She does not show that the arrest was necessarily unlawful." Ruling at 2. However, as stressed throughout prior pleadings, there is no evidence that the arrest was in any way lawful. The officers arrived on the scene of some "disturbance call," handcuffed the victim, and then tried to detain someone, Mr. Garza, who was merely in the vicinity. When Mr. Garza declined to speak to the police, the officers threw him to the ground, choked him, handcuffed him and pepper-sprayed him. Neither the City of Tukwila, the Court of Appeals nor the Commissioner ever cited any case or principle of law that allows for this behavior under U.S. Const. amend. 4 and Wash. Const. art. 1, § 7. In contrast, Ms. Dempere cited cases which specifically hold that someone like Mr. Garza had the right to walk away and not be tackled by the police, since he was suspected of no offense. *State v. Thompson,* 93 Wn.2d 838, 613 P.2d 525 (1980); *State v. Mendez,* 137 Wn.2d 208, 970 P.2d 722 (1999), and *State v. Nettles,* 70 Wn. App. 706, 709, 855 P.2d

609 (1993). *See also Ybarra v. Illinois,* 444 U.S. 85, 91, 62 L.Ed.2d 238, 100 S. Ct. 338 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.").

Accordingly, because the police were violating U.S. Const. amend. 4 and Wash. Const., art. 1, § 7, they were not acting within their official duties. There was insufficient evidence to sustain a conviction under the Due Process Clause of U.S. Const. amend. 14 and *Jackson v. Virginia,* 443 U.S. 307, 61 L.Ed.2d 560, 99 S. Ct. 2781 (1979). This Court should accept review and vacate Ms. Dempere's conviction.

* * *

f. The Instructions Violated the First Amendment

The Commissioner denied review on the First Amendment issues stating that Ms. Dempere did not show a reason to re-examine the issue after it was rejected on direct appeal. However, as noted in prior pleadings, there was minimal discussion on direct appeal of the First Amendment and the holdings of *Houston v. Hill,* 482 U.S. 451, 96 L.Ed.2d 398, 107 S. Ct. 2502 (1987) and *Gulliford v. Pierce County,* 136 F.3d 1345 (9th Cir. 1998). Yet, the holdings of these two cases make it clear that the instructions in this case, especially Instruction No. 5,[1] did not protect Ms. Dempere's right to criticize verbally [sic] police

[1] Instruction No. 5 provided:

Absent a threat of serious bodily injury to the arrested, a person is prohibited from interfering with an arrest made by a uniformed police officer.

Ex. 9.

actions which were harming a third party. When the police are acting illegally and are harming someone, a bystander in a free society has the right under U.S. Const. amend. 1 & 14 to shout at the officers to cease their behavior, even if this shouting interferes with what the officers are doing.[2] *Houston v. Hill, supra.*

Accordingly, review should therefore be granted so that this Court can review fully the First Amendment issues.

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[2] Moreover, as noted in prior pleadings, the direct appeal process was flawed by the fact that prior counsel did not transmit to the Court of Appeals a full record of the trial (transmitting only a few of the nearly thousand pages of transcript), and a conflict of interest between a judge on the Court of Appeals who heard Ms. Dempere's original motion for discretionary review and Judge Peter Lukevich.

(1)

No. 05-136

FILED
SEP 16 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JACKIE DEMPERE,

Petitioner,

v.

THE CITY OF TUKWILA,

Respondent.

On Petition For A Writ Of Certiorari To The Washington Court Of Appeals, Division I

BRIEF IN OPPOSITION

SANDRA S. MEADOWCROFT
Attorney for Respondent
KENYON DISEND, PLLC
11 Front Street South
Issaquah, WA 98027
Phone: (425) 392-7090
Fax: (425) 392-7071
e-mail: Sandy@KenyonDisend.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Respondent City of Tukwila objects to Petitioner Jackie Dempere's Question Presented. Contrary to Ms. Dempere's stated Question, she verbally *and* physically obstructed a police investigation and subsequent arrest. Furthermore, there are absolutely no facts before this Court that the arrest of an individual detained at the scene was illegal – thus provoking Ms. Dempere's involvement. Rather, the alleged illegal arrest of Ramon Garza resulted in a plea of guilt. Accordingly, the City of Tukwila offers the following as the correct issue to be considered by this Court on Ms. Dempere's Petition for Certiorari:

Whether a municipality may criminalize behavior that willfully hinders, delays, or obstructs a law enforcement officer in the discharge of his or her official powers?

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BRIEF IN OPPOSITION

The City of Tukwila, a municipal corporation organized under the laws of the State of Washington, opposes Jackie Dempere's Petition for Writ of Certiorari from the Washington Court of Appeals, Division One's opinion in *In the Matter of the Personal Restraint of Jackie Dempere*, No. 52925-1-I, the Washington Court of Appeals, Division One's denial of Ms. Dempere's Motion for Reconsideration, the Commissioner of the Washington Supreme Court's denial of discretionary review, and the Washington Supreme Court's Order Denying Dempere's Motion to Modify the Commissioner's Ruling, and respectfully requests that this Court deny her Petition.

OPINIONS BELOW

The unpublished opinion of the Washington Court of Appeals issued on October 18, 2004 is reported at 123 Wn. App. 1046 (2004). App. 1-16. The Washington Court of Appeals denied Ms. Dempere's Motion for Reconsideration on December 8, 2004. App. 17. In an unpublished order, issued on February 24, 2005, the Commissioner of the Washington Supreme Court denied discretionary review. App. 18-21. In an unpublished order, entered on May 3, 2005, the Washington Supreme Court denied Ms. Dempere's Motion to Modify the Commissioner's Ruling. App. 22. The judgment imposed by the trial court and the trial court's rulings are unpublished. App. 23-36.

STATEMENT OF JURISDICTION

On May 3, 2005, the Washington Supreme Court entered its Order denying Petitioner's Motion to Modify the Commissioner's Ruling (review denied). App. 22. Accordingly, 28 U.S.C. § 1257 confers this Court with jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in relevant part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . "

Revised Code of Washington ("RCW") § 9A.76.020 provides in relevant part, "A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties."

Tukwila Municipal Code ("TMC") § 8.60.020 provides in relevant part, "The following RCW statutes of the State of Washington are adopted by reference: . . . RCW 9A.76.020 Obstructing a law enforcement officer."

STATEMENT OF THE CASE

Respondent City of Tukwila objects to Petitioner Jackie Dempere's Statement of the Case because it is factually incorrect, it misconstrues pertinent facts, and it contains irrelevant material relating to the Question Presented. The City accordingly offers its own Statement of the Case.

A. Relevant Facts.

The City charged Ms. Dempere with obstructing a law enforcement officer arising from an incident which occurred on October 29, 1998, during which incident she interfered with several City police officers responding to a possible gang-related disturbance. App. 1. The case initially went to trial in October of 1999, and ended in a mistrial. When the case was retried in May of 2000, the jury found Ms. Dempere guilty as charged. App. 2. Ms. Dempere received a suspended sentence that eventually was modified to eliminate any detention and community service requirements and required only the payment of a fine. App. 5.

At trial, the City presented evidence that Tukwila officers were sent to a possible fight at an apartment building on the evening of October 29, 1998. App. 2. Officer Syler, the first officer on scene, encountered a large group of people milling about. App. 2, 38-39. Officer Robertson described the scene during his testimony as chaotic with groupings of individuals within the vicinity. App. 49-51.

Upon arriving at the scene, the officers observed Ramon Garza, with his hands in his pockets, attempting to leave the scene. Tukwila Officer Boyd contacted Mr. Garza

as Mr. Garza walked toward Officer Boyd's police car with his hands in his pockets. Concerned that Mr. Garza could have a weapon, Officer Boyd asked him to remove his hands from his pockets; Mr. Garza refused. App. 3. A physical confrontation ensued between Officer Boyd and Mr. Garza. App. 2.

When Officer Syler noticed Officer Boyd struggling with Mr. Garza a short distance away, Officer Syler left the apparent victim and assisted with Mr. Garza's detainment. According to Officer Syler, Mr. Garza had been violent during prior arrests and had previously assaulted an officer. App. 2. Mr. Garza yelled and cursed and eventually the officers forced him to the ground and secured him in handcuffs. A struggle then ensued between the officers and Mr. Garza after Mr. Garza cursed and threatened the officers, and aggressively attempted to avoid detention. App. 2. Mr. Garza continued to struggle and kick, requiring at least three officers to restrain and move him into a patrol car. Because Mr. Garza continued to kick while situated in the patrol car, the officers used pepper spray to subdue him. App. 2.

Simultaneous with the officers' attempts to restrain Mr. Garza, Ms. Dempere entered the scene. While Officer Syler assisted with detaining Mr. Garza, he noticed Ms. Dempere cross the street and approach the officers with a screwdriver in her hand. App. 3. Officer Syler informed Ms. Dempere that she would have to move back across the street. Specifically, while attempting to secure a volatile and combative Mr. Garza, Officer Syler testified that he told Ms. Dempere to wait across the street as the scene had not been secured. App. 3.

Ms. Dempere moved across the street for a short time. Shortly thereafter, Ms. Dempere again crossed the street to within a few feet of the officers holding Mr. Garza. App. 3, 46-49. Officer Syler testified that Ms. Dempere verbally refused to leave the scene after he repeatedly requested she do so. Ms. Dempere responded that she did not have to do what he said. After some discussion, she returned to the other side of the street. App. 3, 46-49.

A short time later, however, Ms. Dempere once again moved back across the street and approached the officers who were attempting to restrain Mr. Garza. App. 47-49. Officer Syler testified that at this point Ms. Dempere refused to comply with repeated orders to move away from the officers' detention of Mr. Garza and became increasingly hostile. App. 3, 47-49. Officer Robertson testified that after Ms. Dempere crossed the street a third time, she began speaking in Spanish to Mr. Garza. App. 4.

At this point Officer Syler warned Ms. Dempere that if she refused to comply with his request to retreat back across the street away from the investigation, she would be arrested. Ms. Dempere refused to obey. App. 3, 48-49. Because of Ms. Dempere's repeated interference in a lawful arrest, Officer Syler was forced to repeatedly interrupt the lawful arrest of Mr. Garza and the investigation of the reported disturbance. As a result, the officers placed Ms. Dempere under arrest for obstructing a law enforcement officer pursuant to TMC § 8.60.020. App. 3.

B. Misconstrued Facts.

Ms. Dempere makes the false assertion that her arrest and subsequent conviction ultimately resulted solely from her verbal communications with the Tukwila

officers. She attempts to analogize her facts to those of *Houston v. Hill*, 482 U.S. 451 (1987), where the defendant merely yelled at a police officer twice prior to his arrest. In contrast, the facts presented at trial and considered by the jury in Ms. Dempere's case tell a markedly different story of both verbal and physical interference.

Ms. Dempere inserted herself into a crime scene. She did not stand on the sidelines and simply yell her displeasure to the officers. Rather, with a screwdriver in hand, she came across the street and physically intruded into a crime scene investigation. Consequently, Tukwila Officers Syler, Boyd, and Robertson reasonably and repeatedly requested that Ms. Dempere remove herself from the scene and retreat to the other side of the street. Ms. Dempere unreasonably and repeatedly ignored their requests. To avoid further interruption in securing the scene and detaining the physically combative Mr. Garza, Ms. Dempere was placed under arrest.

Ms. Dempere makes the wholly unsubstantiated assertion that the Tukwila officers acted "illegally" when detaining and ultimately arresting Mr. Garza. It is uncontroverted that Mr. Garza pled guilty to charges of both resisting arrest and obstructing a law enforcement officer. App. 53-57. Mr. Garza's arrest and ultimate plea of guilty are not before this Court, nor would Ms. Dempere have standing to bring them before this Court. Even so, Ms. Dempere fails to prove how such allegations would have been admissible or affected her conviction.

Ms. Dempere's allegations regarding the officers' conduct are unfounded, unsupported in this record or otherwise, and wholly inapplicable to the Question Presented. Indeed, both lower reviewing courts dismissed this

assertion. Specifically, the Washington Court of Appeals stated, "Dempere has not cited any authority to support her conclusory assertion that Garza was illegally detained and arrested as a matter of law." App. 11. Additionally, the Washington Supreme Court stated that Ms. Dempere's allegations are based on assertions that Mr. Garza's arrest, with which she interfered, was unlawful. Ms. Dempere, however, does not show that the arrest was necessarily unlawful. App. 19. This Court should disregard Ms. Dempere's incorrect assertion regarding Mr. Garza's arrest.

With regard to Jury Instruction No. 5 referenced by Ms. Dempere at page 4 of her Petition, the Washington Court of Appeals addressed this issue and determined that Ms. Dempere failed to demonstrate that the "ends of justice would be served by reexamining the issue."[1] App. 14. Instruction No. 5 provided that "Absent a threat of serious bodily injury to the arrestee, a person is prohibited from interfering with an arrest made by a uniformed officer." App. 15. The Washington Court of Appeals indicated that the instructional issues raised and rejected in Dempere's direct appeal concluded that Instruction No. 5 was a proper statement of the law and did not prevent Dempere from arguing her theory of the case and that the trial court did not err in failing to give Dempere's proposed instruction.[2] App. 15.

[1] *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999).

[2] The trial court declined to give the following instruction proposed by Dempere: "Under the circumstances of this case, you are instructed that words alone are not sufficient to establish commission of the crime of obstructing a law enforcement officer." App. 15.

REASONS FOR THIS COURT TO DENY MS. DEMPERE'S PETITION

Rule 10 sets forth considerations governing review on Petitions for Writ of Certiorari. Rule 10 clearly describes that, "Review on a writ of certiorari is not a matter of right, but of judicial discretion" which will be granted only for "compelling reasons." Fundamentally, a Petition for a Writ of Certiorari "[i]s rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10.

In this instance, Ms. Dempere's Statement of the Case includes erroneous factual findings regarding allegations that the officers' conduct relating to Mr. Garza was illegal. Additionally, Ms. Dempere entirely misapplies this Court's holding in *Houston v. Hill* (infra).

The facts supporting the City's charge that Ms. Dempere obstructed law enforcement and the resulting conviction by the jury in no way supports Ms. Dempere's allegation that her arrest resulted from her communication of protected speech. Indeed, the City agrees that verbally confronting the police is a right all Americans have under the First Amendment. *Hill*, 482 U.S. at 461 (1987); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974).

In *Houston v. Hill*, this Court addressed a Houston ordinance, which made it unlawful "for any person to assault, strike, or in any manner oppose, molest, abuse or interrupt any policeman in the execution of this duty. . . ." *Hill*, 482 U.S. at 455, quoting Ordinances, City of Houston, Texas § 34-11(a) (1984). Hill had been charged under this ordinance after he shouted at police officers who had stopped his friend. Hill attempted to "divert" the officer's attention from his friend and yelled "Why don't you pick